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6 UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
7 WASHINGTON AT SEATTLE

8 PROPET USA, INC.

9 Plaintiff,

NO. C06-0186 MAT

10 v.

ANSWER TO AMENDED COMPLAINT
AND COUNTERCLAIM

11 LLOYD SHUGART,

12 Defendant.

13
14 Lloyd Shugart ("Shugart") answers the amended complaint of Propet USA, Inc.
15 ("Propet USA") as follows:

16 I. PARTIES, JURISDICTION, AND VENUE

17 1. Shugart admits that Propet USA is a Washington State corporation, with its
18 principal place of business in Auburn, Washington. Shugart also admits that Propet USA is,
19 at least in part, in the business of selling and distributing shoes to the public.

20 2. Shugart admits that he is a professional photographer doing business in
21 Seattle, Washington, through Lloyd Shugart Photography, dba Studio 413 ("Studio 413").

ANSWER TO AMENDED COMPLAINT
AND COUNTERCLAIM - 1

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Shugart admits that Studio 413 provides professional photography services to the public within this judicial district.

3 3. Shugart admits that Propet USA's complaint alleges an action for declaratory
4 relief that arises under the copyright laws of the United States, and that this Court has subject
5 matter jurisdiction over this action. Shugart also admits that he informed Propet USA that
6 various of its uses of his photographs constituted copyright infringement prior to Propet USA
7 filing the instant lawsuit. Shugart denies that Propet USA owns any of the works in question,
8 or that Propet USA is licensed to use all of the photographic works of Shugart and/or
9 Studio 413 currently in use by Propet USA.

4. Shugart admits that venue is proper in this jurisdiction.

11 5. Shugart admits that the Court has personal jurisdiction over him, and that he
12 resides and transacts business in Seattle, Washington.

II. FACTS

14 6. Shugart admits that Propet USA sells "Propet" brand shoes to distributors.
15 Shugart also admits that Propet advertises its shoes in various media that make use of product
16 photographs, and that, in some cases, these photographs show a model wearing a shoe.
17 Shugart admits that the photographs used in such advertising sometimes contain only a
18 product image, such as the image reproduced in Propet USA's amended complaint. Shugart
19 is without information sufficient to form a belief as to the truth or the falsity of the balance of
20 the allegations contained in paragraph 6, and therefore denies the same.

21 7. Shugart admits that he first began doing business with Propet USA on or about July 12, 2000, when Shugart contracted with CPF Marketing Communications to

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1 create a series of images to be used by Propet USA for trade show posters. Shugart granted
2 Propet USA a license to use or publish the images created only for trade show posters and
3 corporate collateral, with all other rights reserved. Shugart produced images under similar
4 agreements in July of 2000 and February of 2001.

5 From June 25, 2001 through March of 2005, Shugart periodically contracted directly
6 with Propet USA to create images, which Shugart licensed to Propet USA for certain usages.
7 The allegation that there was no written agreement between Propet and Shugart concerning
8 rights, licenses, or ownership of the copyright to the works is denied.

9 8. Shugart admits that he invoiced Propet USA for his services, and that the
10 pricing model reflected in those invoices includes a day rate and an hourly rate. Shugart also
11 admits that his invoices include charges for hourly rates and daily rates in the amounts cited
12 in paragraph 8 of Propet USA's amended complaint. However, Shugart's price charged for
13 licensing his works has always included consideration of Propet USA's proposed usage of
14 the work. Since Propet USA's proposed usage did not exceed Shugart's cost of doing
15 business on per project basis, Propet USA was not charged a usage fee on top of the cost of
16 doing business charges. However, had Propet USA reported usage rates consistent with its
17 actual use of Shugart's works, and had reported its intent to distribute these works to third
18 parties, then Shugart would have charged an additional fee to license these expanded uses.

19 9. Shugart admits that he was paid more than \$100,000 from 2003-2005 for his
20 services and for the limited use of his images to which Shugart had agreed. Shugart denies
21 that all invoices were paid in full. Shugart admits that Propet USA terminated its relationship
with Shugart and began using other photographers sometime during 2005, after a late April

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1 2005 meeting at which Shugart advised Ken Johnson of Propet USA that the 2005 Propet
2 catalogue had images that violated the rights of Shugart and the models portrayed in the
3 photos, because any license to use these works and images had expired.

4 10. Shugart admits that, in part, Propet USA used Shugart's photos in the way
5 shoe companies conventionally use shoe photos in their advertising. Shugart also admits that
6 certain of his photos were used by Propet USA on Propet USA's web site, its catalogues, and
7 in other print media. However, without paying for the usage, and in excess of the license
8 granted by Shugart, Propet USA has distributed certain of the images to Propet Canada,
9 Propet Global, and various online retail sellers of Propet shoes. Upon information and belief,
10 Propet USA has also distributed Shugart's images to third parties, including businesses that
11 distribute Propet USA products. Further, Propet has continued to use various of the works
12 beyond the two-year license granted by Shugart, and in excess of the agreed usage.

13 11. The allegations contained in paragraph 11 are denied. Immediately upon
14 reviewing the 2005 Propet catalogue at the late April 2005 meeting, Shugart notified Ken
15 Johnson that Propet USA's use of various of Shugart's works in the 2005 catalogue were in
16 violation of Shugart's copyright in those works. Furthermore, Propet USA continues to use
17 various of these works in violation of Shugart's copyright.

18 12. Shugart admits that, after termination of his relationship with Propet, he
19 continued voicing his complaints that Propet USA was using his images in excess of any
20 license granted in those images. Shugart also admits that he reiterated with Propet USA that
21 Propet USA did not have a license that allowed for third party uses, including use by Propet
 Canada, Inc. or third party on-line retailers. Shugart denies that he told Propet USA that

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1 Propet USA "was permitted to use the Propet Photos in Propet's own advertising," to the
2 extent that such use was outside the time or usage limitations in the license granted to Propet
3 USA.

III. CLAIM FOR RELIEF

13 No further response is necessary to the allegation contained in paragraph 13.

14 The allegations contained in paragraph 14 are denied.

15 The allegations contained in paragraph 15 are admitted.

16 The allegations contained in paragraph 16 are denied.

17. Shugart admits that he has informed Propet USA of his intent to file suit in
to remedy Propet USA's infringement of Shugart's rights, and that such rights include
possibility of pursuing infringement claims against all those that have infringed,
ing third parties.

18. No response is necessary to paragraph 18.

IV. PRAYER FOR RELIEF

Shugart denies that Propet USA is entitled to any of the relief requested.

COUNTERCLAIM

V. PARTIES, JURISDICTION, AND VENUE

1. Lloyd Shugart is a professional photographer doing business in Seattle, Washington, through his business Lloyd Shugart Photography, dba Studio 413 (hereinafter collectively "Shugart").

2. Propet USA, Inc. ("Propet USA") is a Washington State corporation, with its principal place of business in Auburn, Washington.

**ANSWER TO AMENDED COMPLAINT
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1 3. This is an action for copyright infringement that arises under the Copyright
2 Act, 17 U.S.C. § 101, *et seq.*, based on acts of copyright infringement committed in the
3 United States. This Court has subject-matter jurisdiction over this action pursuant to
4 28 U.S.C. §§ 1331 and 1338(a).

5 4. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

6 5. This Court has personal jurisdiction over Propet USA, which resides and
7 transacts business in Auburn, Washington.

8 **VI. FACTS**

9 6. Propet USA and Shugart first began doing business on or about July 12, 2000
10 when Shugart contracted with CPF Marketing Communications USA to create a series of
11 images to be used by Propet for Trade Show Posters. Shugart granted Propet USA a license to
12 use or publish the images created only for Trade Show Posters and corporate collateral, with
13 all other rights reserved by Shugart.

14 7. Shugart was also contracted by CPF to create additional images for use by
15 Propet USA in July of 2000 and February of 2001. Again, Shugart granted Propet a limited
16 license for use of the images created, with all other rights reserved.

17 8. From June 25, 2001 through March of 2005, Shugart contracted with Propet
18 USA directly to create images, which Shugart licensed to Propet USA for certain usages.
19 There were 64 separate photo shoots between these dates. Each photo shoot was executed to
20 fulfill a specific need and usage agreed to between Propet USA and Shugart. Shugart granted
21 Propet USA a limited license to use and publish the images he created during this time, which
was limited in time and usage, with all other rights reserved by Shugart.

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1 9. Shugart also entered into one contract directly with Propet Canada, Inc.
2 ("Propet Canada") on June 11, 2002. Under that contract, Shugart photographed images for
3 which Shugart granted to Propet Canada a license limited in time and usage. Thereafter, a
4 Propet Canada representative told Shugart that, due to the exchange rate and a duty imposed
5 by Canadian tax authorities, it was too expensive to continue using Shugart to produce
6 images for Propet Canada. Upon information and belief, instead of paying Shugart to
7 produce and license images to Propet Canada, Propet USA and/or Robert Propet have been
8 distributing images directly to Propet Canada, thereby infringing on Shugart's copyrights.

9 10. Propet USA's use of images has always been subject to the terms of a written
10 agreement, the Film Delivery Memo. That agreement defines rights and ownership of the
11 film and all images created. The Film Delivery Memos were transmitted by Shugart with the
12 final film and invoice to Propet USA. At all times, Shugart has granted only a limited license
13 to Propet USA for certain usages by Propet.

14 11. Propet USA has reproduced, published and distributed Shugart's images in a
15 manner that exceeds any licenses for these images granted by Shugart.

16 12. The infringement of each of Shugart's rights into each of the copyrighted
17 images constitutes the separate and distinct act of infringement.

VII. CLAIM FOR RELIEF

Count I: Copyright Infringement

20 13. Shugart repeats and realleges every allegation contained in Paragraphs 1
21 through 12 as if fully set forth herein.

**ANSWER TO AMENDED COMPLAINT
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1 14. At all relevant times Shugart has been the exclusive holder of the pertinent
2 copyrights infringed by Propet USA, as alleged hereunder, including but not limited to the
3 Copyrighted Images listed on Exhibit A to this Complaint (collectively, the "Copyrighted
4 Images"). Shugart has applied for a certificate of copyright registration issued by the Register
5 of Copyrights for each of the Copyrighted Images listed on Exhibit A. Shugart anticipates
6 that additional infringements by Propet USA during the course of discovery in this matter,
7 and will amend the Complaint accordingly upon identification of such additional
8 infringements.

9 15. Propet USA's actions constitute infringement of Shugart's exclusive rights
10 protected under the Copyright Act of 1976 (17 USC § 101 *et seq*). As a direct and proximate
11 result of Propet USA's infringement of Shugart's copyrights and exclusive rights under
12 copyright, Shugart is entitled to damages as well as Propet USA's profits pursuant to 17 USC
13 § 504(b) for each infringement.

14 16. Propet USA is liable for the infringing actions of its employees under the
15 theories of *respondeat superior* and vicarious liability. Furthermore, Propet USA is liable for
16 contributory infringement because it has encouraged and benefited from further infringement
17 by third parties.

18 17. The foregoing acts of infringement have been willful, intentional, and in
19 disregard of and with indifference to Shugart's rights.

20 18. Propet USA's conduct is causing, and unless enjoined and restrained by this
21 Court will continue to cause, Shugart great and irreparable injury that cannot be fully
 compensated or measured in money. Shugart has no adequate remedy at law. Pursuant to

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1 §§ 17 USC 502 and 503, Shugart is entitled to injunctive relief prohibiting Propet USA from
2 further infringing Shugart's copyrights and ordering that Propet USA destroy all copies of
3 Shugart's images made in violation of Shugart's copyrights.

Count II: The Digital Millennium Copyright Act (17 USC § 1202 *et seq.*)

5 19. Shugart repeats and realleges each and every allegation contained in
6 Paragraphs 1 through 18 as though fully set forth herein.

7 20. A number of the images provided by Shugart contained Shugart's copyright
8 management information. In a number of circumstances, Propet USA, without Shugart's
9 authority: 1) unlawfully and intentionally removed or altered Shugart's copyright
10 management information; 2) distributed or imported for distribution Shugart's works,
11 knowing that the Copyright Management Information had been removed or altered; and 3)
12 knowingly provided and distributed false copyright information with the intent to induce,
13 enable, facilitate, or conceal infringement.

14 21. As a result of Propet USA's violation of the DMCA, Shugart is entitled to
15 actual damages or statutory damages of not less than \$2,500 and not more than \$25,000 per
16 violation pursuant to 17 U.S.C. §1203.

Count III: Stolen/Lost Photos

18 22. Shugart repeats and realleges each and every allegation contained in
19 Paragraphs 1 through 21.

20 23. Shugart provided images in a number of formats to Propet USA. Shugart has
21 demanded the return of all images provided to Propet USA. Propet USA has returned some,
but not all, of the film and images provided by Shugart.

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1 24. Shugart is entitled to compensation for the damage caused by Propet USA's
2 theft or loss of these images.

VIII. RELIEF REQUESTED

Wherefore, Shugart prays for judgment against Propet USA as follows:

5 1. For entry of preliminary and permanent injunctions providing that Propet
6 USA shall be enjoined from directly or indirectly infringing Shugart's rights in the
7 copyrighted images, including without limitation by displaying these images in catalogues or
8 websites, distributing any of the copyrighted images, or encouraging third parties to make
9 use of the copyrighted images, except pursuant to a lawful license or with the express
10 authority of Shugart;

11 2. For damages including, but not limited to those available under 17 USC § 504
12 and 17 U.S.C. §1203;

13 3. For Shugart's costs.

4. For Shugart's reasonable attorney's fees.

15 | 5. For such other and further relief as the court deems proper.

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**ANSWER TO AMENDED COMPLAINT
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2 DATED: April 21, 2006.
3
4

5 CARNEY BADLEY SPELLMAN P.S.
6
7

8 By _____
9

10 Jon A. Payne, WSBA #25541
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ANSWER TO AMENDED COMPLAINT
AND COUNTERCLAIM - 11

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2006, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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**ANSWER TO AMENDED COMPLAINT
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